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Supreme Court, U.S.
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No. 93-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KEN BREWER,

Petitioner,

v.

WERNER ROGERS, individually,
GILLETT COMMUNICATIONS OF ATLANTA, INC.,
D/B/A WAGA-TV, and
JAMES RYAN SHULER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff: Ken Brewer

Defendants: Werner Rogers

State of Georgia

Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV[1]

James Ryan Shuler

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[1] Pursuant to Supreme Court Rule 29.1, the following is a list of all parent companies and subsidiaries of Respondent Gillett Communications of Atlanta, Inc.: New World Communications of Atlanta, Inc. (the new corporate name of Respondent WAGA); New World Communications Group, Inc.; Andrews Group, Inc.; and MacAndrews & Forbes Holdings, Inc.

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CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a tort action for alleged defamation and invasion of privacy arising from a news report prepared and broadcast by Respondents Gillett Communications of Atlanta, Inc., d/b/a WAGA-TV 5 ("WAGA") and James Ryan Shuler ("Shuler"), its reporter, concerning a public figure's involvement in a matter of legitimate public interest and concern. The report dealt with information learned from public court documents and previously published newspaper articles concerning Petitioner Ken Brewer ("the Broadcast"). [R. 4-15.] Petitioner Brewer was a successful high school football coach at several schools in various parts of Georgia for many years. [R. 5; 291; 322-324; 345-348.] During the season in which the Broadcast was aired, Coach Brewer's Cedar Shoals football team had been ranked as high as third or fourth among all

AAAA schools in Georgia (class AAAA comprises the states' largest high schools). [R. 345-347.] In the days leading up to the Broadcast, Coach Brewer was identified in news wire service reports concerning allegations that members of his football team had their grades changed improperly to make them eligible to play football. These allegations were the subject of a highly publicized investigation by state authorities. [R. 5; 181; 191; 362-363; 571-572; 634-635; 657; 740-746; 763; 792-792; 972-976.] The Broadcast reported that this was not the first time Coach Brewer had been the subject of controversy while coaching in a public high school, and that (1) in 1974, prior to the alleged improprieties at Cedar Shoals, Coach Brewer was arrested on gambling and felony drug charges while he was a coach at Cobb County's Wheeler High School; and (2) Coach Brewer pleaded guilty to the felony drug charge, nolo contendere to the gambling charges, and entered into a first offender plea arrangement. [R. 184-189; 223; 1054-1061; 1068-1070.] It is undisputed that these basic facts are true and were highly publicized at the time of Coach Brewer's previous arrest. [R. 272-273; 280-283; 302; 426-427; 448-449; 509-516; 527-535; 539; 970-971.] The Broadcast was based on information obtained from the public docket books at the Cobb County Superior Court, and from newspaper articles published at the time of Coach Brewer's previous arrest. [R. 182; 759-586; 970-971.]

After the close of discovery, WAGA and Shuler moved for summary judgement on all counts, and filed along with their motion a videotape and transcript of the Broadcast as it was televised.[2] [R. 180-189; 193-196; 223.] WAGA and Shuler submitted evidence showing that they believed at the time of the Broadcast, and believe now, that the Broadcast was true and dealt with a matter of legitimate public interest and concern, and that at neither the time of the Broadcast nor at any relevant time, did WAGA or Shuler bear any type of ill will, hatred or malice toward Brewer, whom they did not know. [R. 182; 191; 300; 441.] Coach Brewer offered no evidence whatsoever to contradict WAGA and Shuler's evidence on these points.

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[2] The contents of the Broadcast were also summarized in the Court of Appeals' opinion, attached to Brewer's Petition as B-1 through B-23.

Based on the undisputed facts in the record, as opposed to Coach Brewer's continued mischaracterization of them,[3] the trial court granted summary judgement to WAGA and Shuler on all counts. (Appendix to Petition, C1-14.) Coach Brewer appealed the judgment only as to his claims for defamation and false light invasion of privacy. (Appendix to Petition, B1, n.1.) The Court of Appeals affirmed the trial court's grant of summary judgment on both claims, holding that Coach Brewer was a public figure for purposes of his suit, and that actual malice could not be proved since the alleged failure to investigate adequately, without more, is insufficient to show actual malice. (Appendix to Petition, B-1-23.) After the Court of Appeals denied Brewer's motion for reconsideration, the Georgia Supreme Court denied his Petition for Certiorati. (Appendix to Petition, A-1.) Having failed to interest the Georgia Supreme Court in this case, Coach Brewer now asks this Court to review it, despite the fact that three separate courts have all applied the well-settled, constitutional actual malice standard to Coach Brewer, an admitted public figure, to reject all of his claims.

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[3] Brewer continues in this Court his mischaracterizations of the facts of record which began in the trial court and continued in the Georgia Court of Appeals. Specifically, contrary to Brewer's assertions, his career was not destroyed; the Broadcast did not depict Brewer as a convicted felon, "trash" or an "unrehabilitated" criminal; WAGA and Shuler did not "admit" any purpose to have Brewer fired and keep him from working as a coach as a result of the Broadcast; WAGA and Shuler did not misunderstand the docket entry concerning Brewer at the time of the Broadcast; the Broadcast did not misquote the newspaper articles on which it relied; the Broadcast did not refer to Brewer as a "gambling kingpin"; WAGA and Shuler did not "ignore" the docket entry showing Brewer was "adjudicated not guilty" after serving his sentence under Georgia's first offender statute—a picture of the entry was aired in the Broadcast; Respondent Rogers did not call Brewer "trash" or say that he was a problem teacher; Brewer's heart attack was not caused by the Broadcast, having occurred more than a year and three months after it was aired; WAGA and Shuler did not get their facts wrong in the Broadcast; and WAGA and Shuler did not broadcast any sealed court records concerning Brewer. Brewer's factual assertions to the contrary are simply not supported by the record.

SUMMARY OF THE ARGUMENT

The Petition should be denied because this case raises no special or important reasons to justify Supreme Court review. There is no conflict among the United States courts of appeal or state courts of last resort on the questions presented. The first amendment actual malice standard applied by the courts below has been well-settled for thirty years, and the standard for determining that Coach Brewer is a public figure has been well-settled nearly as long. The decision below applied these standards consistently with this Court's decisions. Accordingly, there are no special or important reasons for granting certiorari in this case.

REASONS FOR DENYING THE PETITION

This case does not warrant review by this Court on certiorari because it involves well-settled applications of equally well-settled principles of first amendment jurisprudence. The actual malice standard which Coach Brewer effectively asks this Court to discard, has been recognized as the law of the land for thirty years, beginning with the landmark case of *New York Times v. Sullivan,* 376 U.S. 254 (1964). The requirement that actual malice requires proof of something more than an allegedly inadequate investigation has been recognized at least since *St. Amant v. Thompson,* 390 U.S. 727, 731-733 (1968). The applicability of the actual malice standard to public figures like Coach Brewer, and to invasion of privacy claims, has been the law at least since *Curtis Publishing Company v. Butts,* 388 U.S. 130, 163-165 (1967) (Warren, J., concurring in the result), and *Time, Inc. v. Hill,* 385 U.S. 374, 387-88 (1967). The questions presented by Coach Brewer, to the extent they can be understood, reflect nothing more than a straight forward application of these well-settled, well-reasoned principles to the facts of his claim. Since no novel questions are presented in this case, the petition should be denied.

The actual malice standard as applied to public figures like Brewer serves important first amendment purposes in insuring

vigorous public discourse on matters of legitimate public interest, such as the quality, integrity and fitness of those charged with coaching high-profile athletic teams in our public schools. As this Court recognized in first adopting the actual malice standard in *New York Times,* the first amendment embodies and protects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on [public figures]." *New York Times,* 376 U.S. at 270. Thus, any abridgment of these constitutional protections would have far-reaching and dangerous consequences for our democratic society. Not only would thirty years of first amendment jurisprudence concerning public figures be thrown out the window, but numerous other constitutional privileges would also be called into question, including the privilege to report information obtained from official government records. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491 (1975).

In addition, the issues Coach Brewer attempts to frame do not involve any conflict among the United States courts of appeal or the state courts of last resort. In fact, Brewer does not even attempt to argue that any such conflicts exist. Absent such a conflict, there is no sufficient reason for this Court to review this case on certiorari.

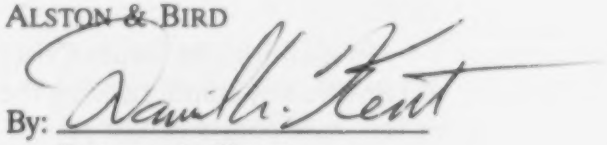
Finally, the three courts below correctly applied the well-settled constitutional standards governing what constitutes a public figure to determine that Brewer is a public figure based on the undisputed facts of this case. The trial court reviewed the undisputed facts in the record to make that determination initially, then the Court of Appeals looked at the record again, reaching the same conclusion. The Georgia Supreme Court saw nothing improper in the Court of Appeals' decision to justify review on certiorari. Thus, all three courts that have considered the issues raised by Brewer agree that the determination that Brewer is a public figure in this case was proper, and that Brewer could not prove actual malice in this case.

This is simply not a case that warrants review by this Court on certiorari. The constitutional principles of actual malice and public figures are well-defined and their applicability well settled. The courts below applied these constitutional principles appropriately. Brewer simply does not like the result these constitutional principles require in this case, and asks the Court to completely abandon thirty years of first amendment jurisprudence to somehow let his claims survive on little more than that basis. This is not the sort of special and important reason for the Court to review a case on certiorari, however, and the petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be Denied.

ALSTON & BIRD

By: 

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